



COMMISSION OF THE EUROPEAN COMMUNITIES

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Draft
COMMISSION DIRECTIVE

**amending Directive 80/723/EEC on the transparency of financial relations
between Member States and public undertakings**

(presented by the Commission)

Draft
COMMISSION DIRECTIVE
of
amending Directive 80/723/EEC on the transparency of financial relations
between Member States and public undertakings

THE COMMISSION OF THE EUROPEAN COMMUNITIES.

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

- (1) Whereas Commission Directive 80/723/EEC¹, as last amended by Directive 93/84/EEC², requires Member States to ensure that financial relations between public authorities and public undertakings are transparent; whereas Directive 80/723/EEC requires certain financial information to be retained by Member States and supplied to the Commission when requested, while other information has to be supplied in the form of annual reports;
- (2) Whereas various sectors of the economy which were characterised in the past by the existence of national, regional or local monopolies have been or are being opened partly or fully to competition by the Treaty or by rules adopted by the Member States and the Community; whereas this process has highlighted the importance of ensuring that the rules on competition contained in the Treaty are fairly and effectively applied in these sectors, in particular that there is no abuse of a dominant position within the meaning of Article 82 of the Treaty, and no State aid within the meaning of Article 87 of the Treaty unless it is compatible with the common market, without prejudice to the possible application of Article 86(2) of the Treaty;
- (3) Whereas in such sectors Member States often grant special or exclusive rights to particular undertakings, or make payments or give some other kind of compensation to particular undertakings entrusted with the operation of services of general economic interest; whereas these undertakings are often also in competition with other undertakings;
- (4) Whereas Article 86(1) of the Treaty requires that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States must neither enact nor maintain in force any measure contrary to the rules contained in the Treaty; whereas Article 86(2) of the Treaty applies to undertakings entrusted with the operation of services of general economic interest; whereas Article 86(3) of the Treaty requires the Commission to ensure the application of the provisions of Article 86 and to address appropriate directives or decisions to Member States; whereas in order to ensure the application of the provisions of Article 86 of the Treaty the Commission must have the necessary information; whereas this entails defining the conditions for achieving transparency;

¹ OJ L 195, 29.7.1980, p. 35.

² OJ L 254, 12.10.1993, p. 16.

- (5) Whereas complexities linked to the diverse forms of public and private undertakings granted special or exclusive rights or entrusted with the operation of services of general economic interest as well as the range of activities that might be carried on by a single undertaking and the different degrees of market liberalisation in the various Member States tend to hinder application of the competition rules, and particularly Article 86 of the Treaty; whereas it is therefore necessary for Member States and the Commission to have detailed data about the internal organisation of such undertakings, in particular separate and reliable accounts relating to different activities carried on by the same undertaking, as they would be required to maintain if the activities in question were carried on by separate undertakings; whereas such information is not always available or is not always sufficiently detailed or reliable;
- (6) Whereas such accounts should show the distinction between different activities, the costs and revenues associated with each activity, the methods of cost and revenue assignment and allocation and the use of net revenues generated by a specific activity; whereas such separate accounts should be available in relation to, on the one hand, products or services in respect of which the Member State has granted a special or exclusive right or entrusted the undertaking with the operation of a service of general economic interest, as well as, on the other hand, for each other product or service in respect of which the undertaking is active;
- (7) Whereas requiring Member States to ensure that the relevant undertakings maintain such separate accounts is the most efficient means by which fair and effective application of the rules on competition to such undertakings can be assured; whereas the Commission has adopted a Communication on services of general interest in Europe³ in which it emphasises their importance; whereas it is necessary to take account of the importance of the sectors concerned, which may involve services of general interest, the strong market position that the relevant undertakings may have and the vulnerability of emerging competition in the sectors being liberalised; whereas, in accordance with the principle of proportionality, it is necessary and appropriate for the achievement of the basic objective of transparency to lay down rules on such separate accounts; whereas this Directive confines itself to what is necessary in order to achieve the objectives pursued in accordance with the third paragraph of Article 5 of the Treaty;
- (8) Whereas, in certain sectors, provisions adopted by the Community require Member States and certain undertakings to maintain separate accounts; whereas it is necessary to ensure an equal treatment for all economic activities throughout the Community and to extend the requirement to maintain separate accounts to all comparable situations; whereas this Directive should not amend specific rules established for the same purpose in other Community provisions and should not apply to activities of undertakings covered by those provisions;
- (9) Whereas, having regard to the limited potential impact on competition it is not necessary, at this time, to require enterprises with a total net turnover of less than EUR 40 million to maintain separate accounts; whereas, having regard to the limited potential for an effect on trade between Member States, it is not necessary, at this time, to require separate accounts in relation to the supply of certain categories of services; whereas this Directive should apply without prejudice to any

³ OJ C 281, 26.9.1996, p. 3.

other rules concerning the provision of information by Member States to the Commission:

- (10) Whereas in cases where special or exclusive rights have been obtained by an undertaking following an open, transparent and non-discriminatory procedure, or where the compensation for the fulfilment of services of general economic interest has been fixed following an open, transparent and non-discriminatory procedure it does not seem necessary at this time to require such undertakings to maintain separate accounts;
- (11) Whereas Article 295 of the Treaty provides that the Treaty is in no way to prejudice the rules in Member States governing the system of property ownership; whereas there should be no unjustified discrimination between public and private undertakings in the application of the rules on competition; whereas this Directive should apply to both public and private undertakings;
- (12) Whereas the Member States have differing administrative territorial structures; whereas this Directive should cover public authorities at all levels in each Member State;
- (13) Whereas Directive 80/723/EEC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 80/723/EEC is amended as follows:

- (1) The title is replaced by the following:

"Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings".

- (2) Articles 1 and 2 are replaced by the following:

"Article 1

1. The Member States shall ensure that financial relations between public authorities and public undertakings are transparent as provided in this Directive, so that the following emerge clearly:
 - (a) public funds made available directly by public authorities to the public undertakings concerned;
 - (b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions;
 - (c) the use to which these public funds are actually put.

2. The Member States shall ensure that the financial and organisational structure of any undertaking required to maintain separate accounts is transparent as provided in this Directive, so that the following emerge clearly:
- (a) the costs and revenues associated with different activities;
 - (b) full details of the methods by which costs and revenues are assigned or allocated to different activities; and
 - (c) the use of net revenues generated by different activities.

Article 2

1. For the purpose of this Directive:
- (a) "public authorities" means all public authorities, including the State and regional, local and all other territorial authorities;
 - (b) "public undertakings" means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it;
 - (c) "public undertakings operating in the manufacturing sector" means all undertakings whose principal area of activity, defined as being at least 50% of total annual turnover, is in manufacturing. These undertakings are those whose operations fall to be included in Section D - Manufacturing (being subsection DA up to and including subsection DN) of the NACE (Rev. 1) classification*;
 - (d) "undertaking required to maintain separate accounts" means any undertaking that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty, or that is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty and receives State aid in any form whatsoever, including any grant, support or compensation, in relation to such service;
 - (e) "different activities" means, on the one hand, products or services in respect of which a special or exclusive right is granted to an undertaking or services of general economic interest with which an undertaking is entrusted and, on the other hand, each other product or service in respect of which the undertaking is active;
 - (f) "special rights" means rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument, which, within a given geographical area.
 - limits to two or more the number of such undertakings, or
 - designates several competing undertakings, or

confers on any undertaking or undertakings any legal or regulatory advantages which substantially affect the ability of any other undertaking to operate the same activity in the same geographical area under substantially equivalent conditions.

2. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:
- (a) hold the major part of the undertaking's subscribed capital; or
 - (b) control the majority of the votes attaching to shares issued by the undertakings; or
 - (c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

^{*} OJ L 83, 3.4.1993. p. 1."

- (3) In Article 3, "Article 1" is replaced by "Article 1(1)".
- (4) The following Article 3a is inserted:

"Article 3a

1. To ensure the transparency referred to in Article 1 (2), the Member States shall take the measures necessary to ensure that for any undertaking required to maintain separate accounts:

- (a) the operating accounts corresponding to different activities are separate;
- (b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles;
- (c) the cost accounting principles according to which separate accounts are maintained are clearly established.

2. Paragraph 1 shall only apply to activities which are not covered by specific provisions laid down by the Community and shall not affect any obligations of Member States or undertakings arising from the Treaty or from such specific provisions."

- (5) Articles 4 and 5 are replaced by the following:

"Article 4

1. As far as the transparency referred to in Article 1(1) is concerned, this Directive shall not apply to financial relations between the public authorities and:

- (a) public undertakings, as regards services the supply of which is not liable to affect trade between Member States to an appreciable extent;
 - (b) central banks;
 - (c) public credit institutions, as regards deposits of public funds placed with them by public authorities on normal commercial terms;
 - (d) public undertakings whose total net turnover over the period of the two financial years preceding that in which the funds referred to in Article 1(1) are made available or used has been less than EUR 40 million. However, for public credit institutions the corresponding threshold shall be a balance sheet total of EUR 800 million.
2. As far as the transparency referred to in Article 1(2) is concerned, this Directive shall not apply:
- (a) to undertakings, as regards services the supply of which is not liable to affect trade between Member States to an appreciable extent;
 - (b) to undertakings whose total net turnover is less than EUR 40 million;
 - (c) to undertakings which have been granted special or exclusive rights pursuant to Article 86(1) of the EC Treaty or have been entrusted with the operation of services of general economic interest pursuant to Article 86(2) of the EC Treaty for an appropriate period and following an open, transparent and non-discriminating procedure.

Article 5

1. Member States shall ensure that information concerning the financial relations referred to in Article 1(1) be kept at the disposal of the Commission for five years from the end of the financial year in which the public funds were made available to the public undertakings concerned. However, where the same funds are used during a later financial year, the five-year time-limit shall run from the end of that financial year.
 2. Member States shall ensure that information concerning the financial and organisational structure of undertakings referred to in Article 1(2) be kept at the disposal of the Commission for five years from the end of the financial year to which the information refers.
 3. Member States shall, where the Commission considers it necessary so to request, supply to it the information referred to in paragraphs 1 and 2, together with any necessary background information, notably the objectives pursued."
- (6) In Article 5a(3), "ECU" is replaced by "EUR".
 - (7) In Article 6(1), "Article 5(2)" is replaced by "Article 5(3)".

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2000 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Commission